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January 18, 2000

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BY HAND

Magalie Roman Salas, Secretary  
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EX PARTE

RECEIVED  
JAN 18 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Re: Written Ex Parte  
Applications for Consent to the Transfer of Control of Licenses  
and Section 214 Authorizations from U S WEST, Inc.,  
Transferor, to Qwest Communications International Inc.,  
Transferee, CC Docket No. 99-272**

Dear Ms. Salas:

Attached hereto please find a document entitled "Public Interest Merger Conditions Proposed for Supporting the Merger between Qwest Communications International Inc. and U S WEST, Inc." In this document, Allegiance Telecom, Inc. recommends that the Commission impose several specific, discrete conditions on any approval of the proposed merger. These conditions, if adopted, would assist in ensuring that the merger complies with section 271 of the Communications Act of 1934, as amended, and provide support for the applicants' claims that the merger will benefit consumers and competitors.

Pursuant to section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), an original and one copy of this letter and attachment are being provided to you for inclusion in the public record in the above-referenced proceeding.

Sincerely,

*A. Richard Metzger, Jr.*

A. Richard Metzger, Jr.  
Michael B. Hazzard

COUNSEL TO ALLEGIANCE TELECOM, INC.

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**Public Interest Merger Commitments  
Proposed for Supporting the Merger between  
Qwest Communications International Inc. and U S WEST, Inc.**

On August 19, 1999, Qwest Communications International Inc. ("Qwest") and U S WEST, Inc. ("U S WEST") filed applications under sections 214 and 310(d) of the Communications Act of 1934, as amended ("Act"), requesting Commission approval for the transfer of control of licenses and authorizations held by subsidiaries of the two companies in connection with the proposed merger.<sup>1</sup> Before approving this merger, Allegiance Telecom, Inc. ("Allegiance") submits that the Commission should require Qwest/U S WEST to take specific, discrete actions to ensure compliance with the Act, including the in-region interLATA restrictions contained in section 271 and specific provisions of section 251(c).

**I. THE COMMISSION HAS AUTHORITY TO IMPOSE CONDITIONS ON  
MERGERS TO ENSURE COMPLIANCE WITH EXISTING LAW AND  
TO ENSURE THAT ASSERTED PUBLIC INTEREST BENEFITS ARE  
ACHIEVED**

The Commission repeatedly has made clear that it has ample statutory authority to impose conditions on its approval of a proposed merger to ensure that the transaction will serve the public interest. In approving the Bell Atlantic/NYNEX merger, for example, the Commission concluded that "[t]he Communications Act permits the Commission to impose [on any proposed merger] conditions as are necessary to serve the public interest."<sup>2</sup> Section 214(c) of the Act empowers the Commission to attach to licenses "such terms and conditions as in its judgment the public convenience and necessity may require."<sup>3</sup> Section 310(d) provides that no construction permit or station license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience, and necessity will be served thereby."<sup>4</sup> In addition, section 303(r) gives the Commission authority to prescribe restrictions and conditions that may be necessary to carry out the provisions of the Act.<sup>5</sup> In sum,

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<sup>1</sup> *Merger of Qwest Communications International Inc. and U S WEST, Inc.*, Applications for Transfer of Control, CC Docket No. 99-272 (filed Aug. 19, 1999) ("Qwest/U S WEST Application").

<sup>2</sup> *Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 29 (1997) ("Bell Atlantic NYNEX Order").

<sup>3</sup> 47 U.S.C. § 214(c).

<sup>4</sup> *Id.*, § 310(d).

<sup>5</sup> *Id.*, § 303(r).

the Commission, where necessary, clearly may attach conditions to a transfer of lines and licenses to ensure that the public interest is served by the proposed transaction.<sup>6</sup>

The Commission has used its merger review authority to ensure, among other things, that a proposed transaction will not violate the Act and that it will yield affirmative public interest benefits. As one example, to ensure compliance with section 271 of the Act, the Commission required Southern New England Telephone and its subsidiaries to cease the provision of originating interLATA services in SBC's in-region territory.<sup>7</sup> Similarly, the Commission conditioned its finding that the merger of SBC and Ameritech was in the public interest on the applicants' commitment to implement a series of measures designed to ensure their implementation of the local competition provisions of the Act.<sup>8</sup> Allegiance submits that the Commission should use its statutory authority in this proceeding to ensure that the merger of Qwest and U S WEST fully complies with section 271 of the Act and that the asserted public interest benefits of the proposed are realized.

## **II. NARROWLY TAILORED MERGER COMMITMENTS ARE NECESSARY TO ENSURE THAT THE PROPOSED QWEST/U S WEST MERGER IS IN THE PUBLIC INTEREST**

The proposed Qwest/U S WEST merger is different from other mergers reviewed by the Commission to date. If the merger is approved, for the first time since the divestiture of AT&T, an entity that owns a Bell Operating Company ("BOC") also will own substantial, state-of-the-art interLATA telecommunications facilities within that BOC's in-region service territory. The Commission has not previously faced the issue of how to ensure that such a combined entity would comply with the in-region interLATA prohibitions contained in section 271 of the Act.

The proposed Qwest/U S WEST merger also is different from other mergers in that the companies assert that the merger will strengthen the merged entity's incentives to comply with the section 271 checklist, which includes many of the obligations imposed on incumbent local exchange carriers ("LECs") by section 251(c) of the Act. To date, nearly four years after passage of the 1996 amendments to the Act, U S WEST has not demonstrated,

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<sup>6</sup> *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, ¶ 10 (1998).

<sup>7</sup> *See, e.g., Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc., Transferee*, CC Docket No. 98-25, Memorandum Opinion and Order, 13 FCC Rcd 21292, ¶ 36 (1998).

<sup>8</sup> *See, e.g., In re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer of Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, CC Docket No. 98-141, FCC 99-279, ¶¶ 348-49 (Oct. 8, 1999) ("SBC/Ameritech Order").

through a successful application under section 271, that it is meeting its statutory obligations to open its local markets to competitors. To the contrary, competitive entrants have encountered continued U S WEST noncompliance. As McLeod notes, it has experienced “systematic deficiencies in U S WEST’s wholesale services.”<sup>9</sup> Similarly, Covad states that U S WEST “does not provide loops on a timely basis” and “continues to deny ... access to ... remote terminals, sub-loop elements, [and] sufficient [operations support systems].”<sup>10</sup> In sum, U S WEST needs to improve substantially its wholesale performance in order to comply with sections 271 and 251(c) of the Act.

In response to the call of Allegiance and others to require U S WEST to commit to complying with existing legal obligations before merging, Qwest/U S WEST states that “[t]hose rules are what they are and will apply to the merged company just as to any other. There is no cause for a condition requiring compliance for this single company.”<sup>11</sup> Thus, although Qwest/U S WEST vaguely claims that “the post-merger Qwest will have powerful new incentives to satisfy the requirements of [s]ection 271,”<sup>12</sup> the applicants thus far have refused to make any specific, concrete commitments regarding the measures they will implement to substantiate these claims.

In October of this year, the Commission noted that “considering conditions in license and line transfer proceedings is an appropriate and, in [some cases], a necessary process in our application review.”<sup>13</sup> To ensure that any combined Qwest/U S WEST company complies with its obligations under the Act and the FCC’s implementing regulations, and that the merger produces the public interest benefits asserted by Qwest/U S WEST, Allegiance recommends that the Commission require certain narrowly tailored commitments from Qwest/U S WEST prior to approving the requested license transfers.

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<sup>9</sup> Comments of McLeodUSA Telecommunications Services, Inc., CC Docket 99-272, 43 (filed Oct. 1, 1999). See also, Letter from Philip L. Verveer et al., Counsel to McLeodUSA Telecommunications Services Inc., to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98, 1 (filed Jan. 13, 2000) (stating that “U S WEST has been unwilling or unable to provide McLeodUSA with the wholesale inputs McLeodUSA needs to provide competitive local service in the U S WEST region”).

<sup>10</sup> Comments of Covad Communications Company, CC Docket 99-272, 23 (filed Oct. 1, 1999).

<sup>11</sup> *Merger of Qwest Communications International Inc. and U S WEST, Inc.*, Response to Comments on Applications for Transfer of Control, CC Docket No. 99-272, 29 (filed Oct. 18, 1999) (“Qwest/U S WEST Response”).

<sup>12</sup> Qwest/U S WEST Application, 3.

<sup>13</sup> *SBC/Ameritech Order*, ¶ 350.

### III. AN INDEPENDENT AUDIT IS NEEDED TO ENSURE THAT THE MERGER COMPLIES WITH SECTION 271 OF THE ACT

As outlined above, the proposed Qwest/U S WEST transaction poses unique questions that implicate directly the in-region interLATA restrictions of section 271. Qwest/U S WEST has filed with the Commission a *Divestiture Plan* that provides a useful overview of how the merging companies plan to divest in-region interLATA facilities. The *Divestiture Plan*, however, provides no mechanism for determining whether Qwest/U S WEST will be in compliance with section 271, including any requirements the Commission may impose in this proceeding, at the time merger closes.<sup>14</sup> To ensure that compliance, the Commission should require Qwest/U S WEST to retain an independent, third-party auditor to certify that the combined company has divested all in-region interLATA facilities and services in accordance with section 271 and applicable Commission requirements.<sup>15</sup>

The Commission recently approved a similar audit procedure in connection with its review of the SBC/Ameritech merger.<sup>16</sup> Specifically, SBC/Ameritech committed to hire an independent, third-party auditor, or auditors, acceptable to the Chief of the Common Carrier Bureau.<sup>17</sup> The auditor is responsible for reviewing SBC/Ameritech's compliance with the Commission's collocation rules and issuing an attestation report resulting in a positive opinion (with exceptions noted) regarding whether the terms and conditions of SBC/Ameritech's collocation offerings comply with Commission rules.<sup>18</sup> Allegiance recommends that the Commission similarly require an auditor to review and certify, by affidavit or similar formal statement, Qwest/U S WEST's compliance with section 271.

The auditor's report on Qwest/U S WEST's section 271 compliance should be submitted to the Commission prior to the merger's closing, rather than subsequent to closing.<sup>19</sup> Indeed, until such time as the independent, third-party auditor formally certifies that the applicants have completed the steps necessary to comply with section 271, the Commission should not permit the merger to close.

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<sup>14</sup> *Qwest Plan for Divestiture of InterLATA Business in the U S WEST Region*, CC Docket No. 99-272 (filed Oct. 18, 1999) ("*Divestiture Plan*").

<sup>15</sup> Comments of Allegiance Telecom, Inc., CC Docket 99-272, 5-7 (filed Oct. 26, 1999).

<sup>16</sup> *SBC/Ameritech Order*, ¶ 387.

<sup>17</sup> *Id.*, Appendix C ¶ 39.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*, Appendix C, ¶¶ 40-41.

#### **IV. PERFORMANCE COMMITMENTS BY THE APPLICANTS ARE NECESSARY TO ENSURE THAT THE ASSERTED BENEFITS OF THE MERGER ARE ACHIEVED**

As noted above, Qwest/U S WEST asserts that the proposed merger is in the public interest, in part, because the merged company will have greater incentives to comply with the section 271 competitive checklist.<sup>20</sup> Nowhere in its application, however, does Qwest/U S WEST provide a single concrete commitment to demonstrate that these alleged enhanced incentives will lead to significantly improved performance in meeting the merged company's market-opening obligations. To the contrary, Qwest/U S WEST argues that "there is no cause for a condition requiring compliance for this single company."<sup>21</sup>

The Commission should not let Qwest/U S WEST have it both ways. To ensure that the public interest benefits of the proposed merger are indeed realized, the Commission, at a minimum, should not approve the merger unless Qwest/U S WEST agrees to specific commitments that translate the touted benefits into concrete performance requirements that implement its obligations under section 251(c) of the Act. To that end, Allegiance recommends that the Commission require Qwest/U S WEST to adopt several of the merger conditions agreed to by SBC/Ameritech, as described below.

1. Separate Affiliate for Advanced Services. The Commission should require Qwest/U S WEST to establish a separate affiliate for the provision of advanced services, similar to the one that SBC/Ameritech is required to establish.<sup>22</sup> As the Commission noted in the SBC/Ameritech proceeding, "an advanced services separate affiliate will provide a structural mechanism to ensure that competing providers of advanced services receive effective, nondiscriminatory access to the facilities ... that are necessary to provide advanced services."<sup>23</sup> Allegiance also notes that the Commission, in its evaluation of Bell Atlantic's section 271 application for New York, found that "the creation of a separate affiliate for the provision of retail services may provide significant evidence that a BOC complies with the nondiscrimination requirements of the [section 271] competitive checklist."<sup>24</sup> Thus, a commitment by Qwest/U S WEST to establish a separate affiliate for advanced services would provide support for a finding that approval of the merger would advance competition and would increase the likelihood of compliance with the section 271.

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<sup>20</sup> Qwest/U S WEST Application at 18.

<sup>21</sup> Qwest/U S WEST Response at 29.

<sup>22</sup> *SBC/Ameritech Order*, ¶ 363.

<sup>23</sup> *Id.*

<sup>24</sup> *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404, ¶ 331 (rel. Dec. 22, 1999).

2. Carrier-to-Carrier Performance Plan. In order for the Commission to conclude that the merger will, in fact, be pro-competitive, Qwest/U S WEST should commit to specific performance standards for basic unbundled network elements and operations support systems (“OSS”) functions. SBC/Ameritech, for example, has committed to a “carrier-to-carrier” performance plan with two components: (1) monthly reporting to competitive LECs on OSS performance in 20 measurement categories and (2) self-executing penalties payable to the U.S. Treasury should the merged entity fail to meet the OSS performance measures.<sup>25</sup> A Qwest commitment to a similar performance plan would provide support for the applicants’ claim that the merger will promote competition in the U S WEST region.

3. Collocation Compliance. To ensure that the merged company’s in-region markets are open to entry by facilities-based providers, such as Allegiance, Qwest/U S WEST should commit to implement a collocation compliance plan patterned after the plan SBC/Ameritech agreed to adopt in connection with that merger. In advance of the merger closing date, SBC/Ameritech has agreed to file in each of its in-region states a collocation tariff (or amendments to existing tariffs) that contains “all rates, terms, and conditions necessary to bring SBC/Ameritech’s provision of collocation into compliance with the Commission’s governing rules.”<sup>26</sup> In addition, SBC/Ameritech has committed to engage an independent auditor to monitor and evaluate ongoing compliance with the Commission’s collocation rules.<sup>27</sup> The Commission adopted its collocation rules “to enable competitive LECs to compete effectively with incumbents.”<sup>28</sup> A commitment by Qwest/U S WEST to a specific, comprehensive plan for ensuring that the merged company will comply with the Commission’s collocation rules would provide credible support for the conclusion that approval of the merger would advance competition.

4. Most Favored Nations Arrangements. To facilitate rapid competitive entry throughout the U S WEST territory, Qwest/U S WEST should commit to negotiating region-wide interconnection agreements and adopt a Most Favored Nation policy for in-region and out-of-region interconnection arrangements, similar to the commitment made by SBC/Ameritech.<sup>29</sup> Under such a policy, Qwest/U S WEST would make available to any requesting telecommunications carrier in the combined company’s in-region states any interconnection term or condition provided through a negotiated agreement without unnecessary restrictions. In addition, Qwest/U S WEST would make available to competitors in the U S WEST region any

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<sup>25</sup> *SBC/Ameritech Order*, ¶ 378.

<sup>26</sup> *Id.*, Appendix C, ¶ 38.

<sup>27</sup> *Id.*, ¶¶ 39-41.

<sup>28</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, ¶ 18 (rel. March 31, 1999).

<sup>29</sup> *SBC/Ameritech Order*, ¶ 388.

interconnection agreement term or condition that Qwest/U S WEST utilized outside its home territory without unnecessary restrictions. The adoption of this policy would add support to Qwest/US WEST's asserted commitment to opening U S WEST markets to competition and competing as a new entrant outside of the U S WEST territory.<sup>30</sup>

5. Carrier-to-Carrier Promotions. To offset the loss of Qwest as a potential competitor in the U S WEST region<sup>31</sup> and to facilitate market entry, Qwest/U S WEST should commit to provide carrier-to-carrier promotions, such as discounted prices for unbundled network elements for a specified period of time. A commitment by Qwest/U S WEST to provide such carrier-to-carrier promotions would provide significant support for Qwest/U S WEST's assertions that the proposed merger will result in public interest benefits.

## V. CONCLUSION

The foregoing proposals, if incorporated as conditions on the Commission's approval of the Qwest/U S WEST merger, will provide some support for the applicants' claims that the merger will produce benefits for consumers and competitors. The proposed audit requirement will ensure that the divestitures and other measures specified by the Commission to bring the merged company into compliance with section 271 have been fully implemented prior to closing. The proposed performance requirements will provide concrete support for the public interest benefits of the merger claimed by Qwest/U S WEST.

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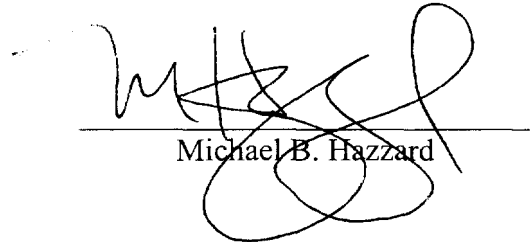
<sup>30</sup> Allegiance also notes that such a commitment would mitigate discrimination issues that could result from BellSouth's ownership interest in Qwest. Under this MFN proposal, Qwest/U S WEST would have to provide competitors with any negotiated interconnection-related item (on a term-by-term basis) that Qwest/U S WEST obtained from BellSouth. Similarly, Qwest/U S WEST would be required to provide competitors with any negotiated interconnection agreement term, condition, or price provided to BellSouth, or any BellSouth subsidiary, operating within the Qwest/U S WEST in-region territory. *See*, Comments of Allegiance Telecom, Inc., CC Docket 99-272, 12 (filed Oct. 1, 1999).

<sup>31</sup> *See, e.g.*, Comments of Allegiance Telecom, Inc., CC Docket 99-272, 5 (filed Oct. 1, 1999).



### **CERTIFICATE OF SERVICE**

I, Michael B. Hazzard, do hereby certify that on this day of January 18, 2000, I caused a copy of the foregoing written Ex Parte of Allegiance Telecom, Inc. to be served by messenger and first-class mail, postage prepaid, upon each of the parties on the attached service list.



Michael B. Hazzard

\* By Messenger

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